

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIV 11-0217 MCA/KBM

ROBERT LEE NICK,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE’S
PROPOSED FINDINGS
AND
RECOMMENDED DISPOSITION

The Magistrate Judge filed proposed findings on August 3, 2011, recommending that Defendant’s § 2255 petition seeking habeas relief be denied. *Doc. 14*. Thereafter, Defendant filed timely objections, which I have carefully reviewed *de novo* and find without merit. *See Garcia v. City of Albuquerque*, 232 F.3d 760, 766-67 (10th Cir. 2000).

Defendant asserts as an “erroneous fact” the Magistrate Judge’s observation that I permitted defense counsel to “demonstrate” a key opened the lock in question. *Doc. 15* at 1; *see also Doc. 14* at 2 (citing *United States v. Nick*, 398 F. App’x 404 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 1536 (2011)); *United States v. Nick*, CR 08-52 MCA (Doc. 167 at 416-19) (portion of transcript of trial regarding discussion outside presence of jury); *id.* (Doc. 148 at 4) (denial of motion for evidentiary hearing and now trial). I am confident that what the Magistrate Judge

meant to convey is that defense counsel demonstrated to the *Court's* satisfaction that the key fit the lock, but that I did not permit counsel to demonstrate the same to the **jurors**.

While Defendant is correct that I did not permit defense counsel to make that demonstration to the jurors, nothing in the analysis of the magistrate judge's proposed findings suggests that she recommended relief be denied because a demonstration took place. Instead, the proposed findings note that all of Defendant's claims rest on the belated production of the key to the lock, and that a necessary showing of "prejudice" is common to all of the claims. The proposed findings quoted in detail, as well as findings that I and the Tenth Circuit made in denying relief after trial, directly address prejudice and explain why Defendant has not suffered any from the incident. I agree that those reasons are equally dispositive of Defendant's request for habeas relief.

IT IS THEREFORE HEREBY ORDERED AS FOLLOWS:

1. The objections are sustained in part, insofar as the Court rejects the suggestion that defense counsel actually demonstrated to the Court that the keys fit the lock;
2. Otherwise, the Magistrate Judge's Proposed Findings and Recommended Disposition (*Doc. 14*) is ADOPTED WITH THE ABOVE FACTUAL CLARIFICATION;
3. Defendant's § 2255 petition is DENIED; and
4. A final order and order denying a certificate of appealability enter concurrently herewith.



UNITED STATES DISTRICT JUDGE